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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 395

CONSUMERS COMPANY,

Petitioner,

vs.

CONSUMERS PETROLEUM COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Consumers Company, respectfully petitions this Court to review on writ of certiorari a judgment of the United States Court of Appeals for the Seventh Circuit entered July 16, 1948, in the case of Consumers Petroleum Company *vs.* Consumers Company, No. 9407, reversing in part, by a two-to-one decision, a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, in favor of your petitioner. A petition for rehearing in said cause was denied by the Court of Appeals by an order entered August 19, 1948.

Summary and Short Statement of the Matter Involved.

The action, filed February 16, 1940, was for alleged unfair competition and sought to enjoin defendant from "using the name 'Consumers' in connection with the buying, selling, manufacturing and dealing in petroleum and its by-products * * * in the City of Chicago, and State of Illinois, and from selling or distributing or advertising for sale any of the aforesaid products under the name 'Consumers Company' * * *." (Tr. 8, 9.) An accounting was also sought.

The defendant (petitioner), whose predecessor (hereinafter included in the terms "defendant" and "petitioner" since both Courts held there was no question about the succession) had conducted a large business in fuel and building materials in the Chicago area under the name "Consumers Company"* for thirteen years before the plaintiff (respondent) corporation was organized in 1925, denied unfair competition and counterclaimed against the plaintiff for unfair competition and for infringement of a trade-mark (in the form of a distinctive seal) which had long been identified with defendant's business. The District Court dismissed the complaint and the counterclaims (the latter because of long delay on the part of the defendant in asserting the charges therein contained). (Tr. 300-305.) The plaintiff appealed from the dismissal of the complaint but no appeal was taken from the dismissal of the counterclaims. The Court of Appeals affirmed the District Court in respect to damages and (by a divided court) reversed it in respect to the injunction issue. (Tr. 328, 350.)

* The corporate name of defendant's predecessor from 1913 to 1937 was "Consumers Company". Upon reorganization in 1937 the name became "Consumers Company of Illinois", which was changed back to "Consumers Company" in 1940. It was then stipulated (Tr. 38) that "the parties will proceed as if the proceedings were now by name specifically against 'Consumers Company'".

After denial of the petition for rehearing, a petition for clarification of the Court's opinion was filed since it was not believed to be clear from the majority opinion whether it was intended that petitioner should be enjoined from making any use of, or reference to, its corporate name in connection with its fuel oil business or that the injunction should be a conditional one which would not put the petitioner out of that business. This petition was denied on September 24, 1948, without opinion.

The alleged unfair competition of the defendant was merely the addition in 1927 of fuel oil to its line of fuel products (which since 1913 had included coal, coke, wood and petroleum carbon) and a large expansion of its fuel oil business in 1938.

The majority opinion, while holding that an injunction should be issued, stated that "the defendant was guilty of no fraud or palming off" and that "In fact, we are satisfied there is nothing in defendant's conduct that demonstrates a lack of honesty or good faith". (Tr. 90, 101.) Furthermore, it did not hold that there was any secondary significance in the plaintiff's name and the dissenting opinion said (Tr. 347) that "there is no finding of secondary meaning attaching to the word as used by the plaintiff". The District Court in effect found that defendant's name and the word "Consumers" had acquired a secondary meaning in the fuel business in the Chicago area indicating the defendant, not the plaintiff. (Tr. 280, 304.)

The majority opinion held (Tr. 335) that "The word 'consumers' is a common word • • •", and the dissenting opinion said (Tr. 347) that it "is a descriptive word in the public domain incapable by the mere act of appropriation of becoming the exclusive property of anyone".

The District Court and the dissenting opinion in the Court of Appeals held that plaintiff deliberately adopted a

name similar to the defendant's and imitated the well-known and widely advertised seal which defendant had long used in its business, in order to benefit from defendant's favorable reputation. (Tr. 304, 348.) The majority in the Court of Appeals did not deny this but apparently thought it was immaterial.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the United States Judicial Code, as amended (28 U. S. C., Sec. 347).

Opinions Below.

The majority and dissenting opinions of the Court of Appeals are reported in 169 Fed. (2d) 153 and appear in the Transcript at pages 328-349. The findings and conclusions of the District Court were not published but are set out in the Transcript at pages 300-305.

Questions Presented.

The principal question presented is whether a long-established corporation, acting honestly and in good faith and being guilty of no fraud or palming off, may be enjoined from using its corporate name in the business of marketing a new specific product in the same general field in which it has been engaged, and in which it has created a valuable good will, at the instance of a corporation subsequently formed under a similar name, especially when there is no finding of secondary significance in the later corporation's name and it is not inherently distinctive.

An auxiliary question is whether a finding by the District Court (Tr. 304-5) in such a case, supported by ample evidence, that the later corporation adopted its name in bad faith, with the intent of profiting from the defendant's rep-

utation and good will, and was in a court of equity with unclean hands, may be disregarded by the Court of Appeals.

Reasons Relied on for Allowance of the Writ.

The majority of the Court of Appeals has decided an important question of law in a way in conflict with the applicable decisions of the Illinois courts and with applicable decisions of this Court and of other United States Courts of Appeals. The question is perhaps primarily one of local law, since it falls within the realm of unfair competition, but similar questions have been dealt with by this Court and by various federal courts without particular reference to the local law of the states in which the cases arose and therefore there may be said to be also a body of federal law on the question involved.

The general importance of the question resides in the fact that the majority opinion, if it stands and is followed, would deprive corporations of property rights of incalculable value (often worth many millions of dollars) in their names, and would encourage unscrupulous persons to appropriate names of businesses which have become well known to the public. If, by adopting or closely simulating the name of a well and favorably known corporation and engaging in the business of marketing a specific product in the general field of that corporation which it would be likely to add to its line in normal course but has not yet begun to sell, a later corporation could not only gain the right to use the name but prevent the earlier corporation itself from using it in connection with such a product, a "chiseler" could reap an unjust reward and even place himself in position to exact unconscionable tribute from the older corporation for permitting it to make a normal expansion of its business. Furthermore, the public is entitled to be protected in its dealings with a well-

known corporation whose integrity it has come to know and to identify with the name.

A further reason for allowance of the writ is to resolve the doubt on the question of law involved which is clearly indicated by the vigorous opinions of two of the federal judges who have considered the case, diametrically opposed to the opinion of the other two.

Another reason is to prevent the great and irreparable hardship upon and loss to the petitioner which would result from what the dissenting opinion called the majority's "misconception of the issue here". (Tr. 347.) If respondent's interpretation of the majority's opinion (which it has refused to clarify), namely, that it means that petitioner should be enjoined from making any use of its corporate name or the word "Consumers" in connection with the fuel oil business, *which in effect would prevent petitioner from engaging in that business,* should prevail, a major part of petitioner's large business, which is carried on throughout the Chicago area, would be destroyed. It is accordingly believed that the prospect of such disastrous consequences to an admittedly innocent party should also be regarded as an adequate reason for allowance of the writ.

BRIEF IN SUPPORT OF PETITION.

The Facts.

The facts in this case are simple and, in general, have been indicated above.

Your petitioner, "Consumers Company", the defendant in the above-entitled action, and its predecessor of the same name, had carried on a large and well-known business in the Chicago metropolitan area for many years before the respondent, plaintiff in said action, was organized on December 28, 1925, under the name "Consumers Petroleum Company". (Tr. 185 and 175.) The founder of the plaintiff company, Isador L. Schurman, was familiar at that time with the petitioner's business, which previously had been, and was thereafter, widely advertised through various media throughout the city. (Tr. 38, 45, 107 and 224.)

Petitioner had not yet begun to sell fuel oil, which was then coming into general use, but had dealt extensively in other fuels, namely, coal, coke, wood and petroleum carbon. (Tr. 90, 101, etc.) It began the sale of fuel oil in a small way in 1927 (about a year and a half after respondent started) and, beginning at that time, it advertised this product widely (through newspapers, billboards and signs and in the classified telephone book where it inserted a display advertisement of fuel oil adjacent respondent's listing). (Tr. 95-101 and Df's. Exhs. 19-110.) It always thereafter sold this product as well as others under its own name and for its own account (not as agent) but until 1938 it filled its orders with oils of the Standard Oil Company, which made the deliveries. In 1938 petitioner put in its own bulk storage tanks and thereafter made its own deliveries. At that time its volume was greatly increased

and its business in this type of fuel has assumed large proportions. (Tr. 230-233.)

The respondent has continuously sold fuel oil since its organization on December 28, 1925. No explanation was offered on its behalf for selection of the name "Consumers Petroleum Company" and its use of the abbreviation "Consumers" in the same general way that petitioner had previously used it (as the record shows to be the case, Tr. 35, 175), except that Schurman testified (Tr. 44) that he called the petitioner and was told by an operator that the Consumers Company did not sell fuel oil.

The facts showing respondent's lack of good faith in imitating petitioner's name and seal and the other pertinent facts are clearly brought out in the findings of the District Court (Tr. 300-305), one of which is here quoted:

> "17. Plaintiff, in adopting the name Consumers Petroleum Company, in using a seal with the words 'Consumers' and 'Guaranteed' prominently displayed thereon (as defendant had done for a long time), and in using the word 'Consumers' to identify its business in the manner aforesaid, was motivated, in the Court's opinion, by the fact that defendant had previously made the name 'Consumers' and said distinctive seal well known in the fuel business in Chicago and by a desire and intent on the part of plaintiff to profit from defendant's reputation and good will. Its adoption of a similar name and seal is hereby found not to have been innocent or accidental."

The majority opinion did not reject the findings of fact of the District Court but merely said (Tr. 331) (referring to the question of whether, under the Rules of Civil Procedure, the District Court's findings or the findings of the Master should be accepted by the Court of Appeals as presumptively correct):

> "We think there is no occasion to discuss the effect which should properly be given these rules because, as

> we view the matter, the result reached by the court, contrary to that of the Master, was occasioned in the main by the application of different principles of law."

We think it is clear, therefore, that the District Court's findings are to be taken as correct, as indeed they must be under Rule 52(a), FRCP, unless found by the upper court to be "clearly erroneous". It was accordingly clear error for the Court of Appeals to disregard them on the issue of unclean hands and the other fact issues in the case.

Respondent made no protest against petitioner's engaging in the fuel oil business until 1940 after petitioner, with respondent's knowledge and affirmative acquiescence, had spent large sums on facilities for greatly enlarging this branch of its business. (Tr. 301.) The District Court therefore held that respondent was barred by laches and estoppel, as well as by unclean hands and because of the complete lack of any wrongdoing by the petitioner.

Judge Minton in his dissenting opinion (Tr. 345) strongly concurred in the findings and conclusions of the District Court and his opinion clearly states the facts and the applicable principles of law which led him to the conclusion that "The only evidence of questionable conduct in the instant case is that of the plaintiff". (Tr. 349.)

Applicable Decisions.

The majority opinion is believed to be based on a definitely wrong conception of the law of unfair competition as it applies to corporate names and to be in conflict with many authoritative decisions, a few of which will now be mentioned.

This Court in the case of *Howe Scale Company* v. *Wyckoff*, 198 U. S. 118, said:

> "The principle that one corporation is not entitled to restrain another from using in its corporate title a

name to which others have a common right, is sustained by the discussion in *Columbia Mill Company* v. *Alcorn*, 150 U. S. 460, and is, we think, necessarily applicable to all names *publici juris*. p. 137.

* * * * *

"* * * Courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of the use.

* * * * *

"We hold that, in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name." p. 140.

The majority opinion in the instant case recognized the importance of this decision but expressed the view that its "rationale has been considerably limited by more recent decisions". The only Supreme Court case which it cited as an example of such decisions is *Waterman Co.* v. *Modern Pen Co.*, 235 U. S. 88, in which this Court said at page 94 that:

"* * * it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that those goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to, and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake."

The defendant there was found guilty of fraudulent conduct and it is perfectly clear that the exception recognized in that case does not apply to the present petitioner, which is the older corporation and was expressly found to have acted honestly and in good faith. Furthermore, even in the facts of the *Waterman* case, all this Court required was that the defendant "take reasonable precautions to prevent the mistake"—not an injunction against the use of the name.

While the majority opinion here is not explicit as to scope of the injunction which it would require the District Court to issue, the Court of Appeals has refused to clarify its opinion and the respondent is contending for an injunction which would prevent the petitioner from making any use of its corporate name or the word "Consumers" in connection with the fuel oil business. Since obviously a corporation cannot conduct any line of business without making some use of its name, such an injunction would put the petitioner out of the fuel oil business, which would be utterly unconscionable and would serve no legitimate purpose.

We think it is safe to say that *it has never before been held that use of a corporate name should be enjoined in the absence of fraud, deception or palming off on the part of the defendant and in the absence of a secondary significance in the plaintiff's name.* Certainly no decision so holding was cited in the majority opinion or by counsel for the respondent in this case. *Therefore the majority opinion is utterly unsupportable by authority and is directly contrary to all applicable decisions.*

The Court of Appeals for the Seventh Circuit itself recognized the correct principle in an earlier case, *General Industries Co.* v. *20 Wacker Drive Building Corporation,* 156 Fed. (2d) 474, in which it said at page 478:

> "* * * To entitle a private party to equitable relief, there must be wrong added to incidental confusion in the use of similar names, such as fraud, deception, or palming off, or the name which it has sought to protect must have acquired a secondary meaning. A court of equity will not enjoin the use of a similar name because of the incidental confusion in the use of that name."

The majority here, in declining to follow the principle there clearly stated, pointed out certain factual differences

between the two cases but if the principle is correct (as we think it clearly is) there is certainly nothing in the facts of this case to prevent application of it here. In fact the strong equities against the respondent, growing out of the circumstances above recited, should make it particularly applicable.

The same principle has been recognized and consistently followed by the Illinois courts. *Hazelton Boiler Company* v. *Hazelton Tripod Boiler Company,* 142 Ill. 494, 508 (cited and quoted from in the dissenting opinion here), and *Elgin Butter Company* v. *Elgin Creamery Company,* 155 Ill. 127, 137, are examples of Illinois Supreme Court decisions which state the law in substantially the same way.

The opinion in the latter case states that the same rule applies to corporations as to natural persons, and to the same effect are the *Waterman* v. *Modern Pen* case (235 U. S. 88, 94) and *Standard Oil Co. of N. M.* v. *Standard Oil Co. of Cal.,* 56 Fed. (2d) 973, 977 (C. C. A. 10), which also held that natural expansion of the business of a senior corporation cannot be blocked by appropriation of a similar name by a junior corporation.

The majority opinion, in seeking to distinguish the *Elgin* case and the *Howe Scale Co.* case, referred to several later Illinois cases, which, as shown by Judge Minton, are not contrary to the principles set forth in the above cases at all. One of them is *Johnson Mfg. Co.* v. *Johnson Skate Co.,* 313 Ill. 106. In that case, despite secondary significance and fraud (which fully distinguish it from this one), the court refused to enjoin all use of the defendant's name, although it required the defendant to use the phrase "Not connected with the Nestor Johnson Mfg. Co." Other Illinois cases of the same type are: *DeLong Co.* v. *Hump Hairpin Co.,* 297 Ill. 359, 365, and *Warshawsky & Co.* v. *A. Warshawsky & Co.,* 257 Ill. App. 571, 584-6.

In *Fidelity Bond and Mortgage Company* v. *Fidelity Mortgage Company*, 12 Fed. (2d) 582, the court (C. C. A. 6) said:

> "It has never been held, so far as we are aware, that one has no right to engage in a particular business in his own name, because another of the same name is already engaged in such business in his name. The most that has been held is that circumstances may be such that he should prevent his goods being confused with those of the other, by explaining in some way that they are his goods, and not the goods of such other person."

If there is any exception to that broad statement it could only be in cases of strong secondary significance in the plaintiff's name or fraud on the part of the defendant, neither of which elements exists here. In the present circumstances not only would an injunction that would prevent petitioner from continuing in the fuel oil business (by enjoining all use of its name in that business) be unthinkable but, in view of petitioner's priority and good faith in the use of its name and the complete lack of fraudulent conduct on its part, as well as respondent's bad faith and lack of secondary meaning in its name, there is, in our opinion, very clearly no basis under the authorities for any form of injunction.

Another Illinois case referred to in the majority opinion is *Lady Esther, Ltd.* v. *Lady Esther Corset Shoppe, Inc.*, 317 Ill. App. 451. In that case relief was granted to a cosmetic manufacturer against use of the name "Lady Esther" by a corset shop because of strong secondary significance attached to the plaintiff's name and bad faith on the part of the defendant. The case plainly is not applicable here because of the absence of both of these factors and for the further reason hereinafter pointed out. In this connection it should be noted that prior to the *Lady*

Esther case "palming off" was held by both the State and federal courts to be an absolute essential of an unfair competition action in Illinois. It was so held in *Stevens-Davis Co.* v. *Mather & Co.*, 230 Ill. App., 45, which was referred to in *Time* v. *Viobin Corp.*, 128 Fed. (2d) 860, 862 (C. C. A. 7) as follows:

> "In the Stevens-Davis case is found a lengthy discussion and analysis of Illinois cases, as well as those of other jurisdictions, and a determination that the so-called 'palming off' doctrine is the rule in Illinois. On page 65, of 230 Ill. App., the court said: 'The courts in this State do not treat the "palming off" doctrine as merely the designation of a typical class of cases of unfair competition, *but they announce it as the rule of law itself—the test by which it is determined whether a given state of facts constitutes unfair competition as a matter of law.* * * *'." (Emphasis added.)

Since in the *Lady Esther* case the parties were not in competition the traditional Illinois palming off rule could not be applied and because of the defendant's wrongdoing, the court made an exception for that particular kind of a case. That the exception is not applicable here, however, is clearly shown by the emphasis placed on the elements of secondary significance and fraud and by the following statement in the opinion:

> "Without stopping to analyze the four cases [Stevens-Davis case and others], we think it sufficient to say that an examination of them discloses the fact that in each there was direct competition between the parties in the business each was conducting—plaintiff and defendant being engaged in the same line of business—*and therefore the palming off rule was applicable.*" (Emphasis added.)

Judge Minton fully distinguished this case by pointing out that it was a "secondary meaning" case and by saying (Tr. 347): "Since in this case the parties are in competition, the issue raised by such cases is not involved." The

majority opinion ignored and is in direct conflict with the firmly established Illinois law on this subject. That descriptive or generic words cannot be appropriated by anyone to the exclusion of others, either as part of a company name or as a trade-mark, in the absence of secondary meaning, has been held in many cases, including *Computing Scale Co.* v. *Standard Computing Scale Co.*, 118 Fed. (2d) 965 (C. C. A. 6) and *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 46. And it is well established that where such words are involved, and the plaintiff cannot show secondary meaning, "priority of use does not avail". Nims on Unfair Competition, 4th Ed., 230 (cited in dissenting opinion, Tr. 346). Therefore respondent's narrow margin of priority in the oil branch of the fuel business clearly gives it no right to exclude petitioner from that branch of the business.

The majority opinion mistakenly accepted a supposed analogy to certain trade-mark cases such as *France Milling Company* v. *Washburn Crosby Co.*, 7 Fed. (2d) 304 (C. C.A. 2) in which the court held that "straight" wheat flour and "prepared" flours were not goods of the same descriptive properties and that the use of the trade-mark "Gold Medal" by a senior user for one type of flour did not give it the right to prevent use of it by a junior user for the other type. Whatever may be said about the correctness of this decision, which, except for very special facts creating an estoppel, is certainly open to question as indicated by the same court in the later case of *Landers, etc.* v. *Universal*, 85 Fed. (2d) 46, 48, it clearly does not apply here where neither party uses the word "Consumers" as a trade-mark (Tr. 301) and where the basic question involved is the inherent right of an innocent party to do business honestly and non-deceptively under its long-established corporate name.

On the question of whether coal and coke are goods of the same descriptive properties as fuel oil, the only case

directly in point which was cited on either side is *Harlan-Wallins Coal Corp.* v. *Transcontinental Oil Company,* 64 Fed. (2d) 122, in which the Court of Customs and Patent Appeals held that they are, saying:

> "* * * They are used for the same purposes, and are sold in competition with each other, by the same dealers, have, to a degree, the same origin, and are closely associated in the public mind. In such cases, it needs little argument to convince one that the prior owner and user of a registered trade-mark on one of these products should be protected against registration of substantially the same mark, by a newcomer who sells the other product.
>
> "The use of coal and oils as fuel is so near akin that we have said that devices for feeding the same, respectively, to furnaces, are goods of the same descriptive properties." (Cases cited.)

The pertinency of that case to the issues here (so far as there is any analogy to trade-mark cases) seems apparent and its conclusion is fully borne out by the evidence in this case as well as in that one; yet the majority opinion dismissed it merely with the arbitrary statement: "We are not impressed, however, with the pertinency of this holding as it relates to the instant case."

It will, of course, also be borne in mind that the issue here is not the right of the petitioner to exclude the respondent from the use of the name but merely its right to continue to carry on its fuel oil business under the corporate name by which it has been known for thirty-five years. The astonishing conclusion arrived at by the majority of the Court of Appeals on this issue is, we submit, entirely out of harmony with all truly applicable decisions and with the basic principles of equity.

Conclusion.

This is believed to be a case in which it is particularly appropriate that this Court should exercise its power of review and supervision. Two federal judges have held each way on the injunction issue involved and the majority in the Court of Appeals has not only reached a most inequitable result from the standpoint of the litigants (threatening the very existence of petitioner's large and perfectly legitimate fuel oil business) but has decided the question at issue in a way in conflict with the applicable decisions of the Illinois and federal courts, including decisions of this Court.

Furthermore, if the majority opinion stands it will have far-reaching undesirable consequences in limiting the rights of corporations in the honest use of their names and in encouraging unscrupulous persons to simulate well-known business names. The case is therefore one of substantial public as well as private importance.

Accordingly your petitioner respectfully prays that (1) this petition be granted to the end that the cause may be reviewed and determined by this Court; (2) that the judgment of the Court of Appeals, entered pursuant to the majority opinion, be reversed; and (3) that petitioner be granted such further relief as may be just and proper.

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November 1, 1948.